To be argued by
ADAM P. KARP

Washington Supreme Court

Supreme Court Docket No. 81295-1

Ct. of Appeals Div. III Docket No. 264122

Spokane Cy. Sup. Ct. Cause No. 07-1-01318-1

Spokane Cy. Dist. Ct. Cause Nos. CC1 & CC2

CITY OF SPOKANE VALLEY *ex rel* CHRIS ANDERLIK,

Petitioner-Appellant

v.

BALLARD BATES & DUANE SIMMONS,

Respondents

PETITIONER'S REPLY BRIEF

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I. PRELIMINARY MATTERS

A. Standing in Trial Court

Respondents appear to question Mrs. Anderlik's standing to bring the CrRLJ 2.1(c) petition at the outset of this matter. While their wording initially focuses on Mrs. Anderlik's inability to seek appellate review of a denial of her CrRLJ 2.1(c) petition, due to lack of standing, upon closer evaluation, Respondents' standing challenge digs deeper. *Respondents' Brief,* Section I(1). Initially conceding that Mrs. Anderlik had "the right to appear before a judge to request the filing of charges" pursuant to CrRLJ 2.1(c) (i.e., she had standing), they then split hairs by alleging she had no "personal 'right' to any particular outcome" of her petition and, thus, no standing to seek appellate review of the trial court's denial of her request. *Id.,* at 7.

The Respondents emphasize that Mrs. Anderlik did not own the male calf at issue and did not personally witness his demise, applying these facts to negate her standing at the appellate level. *Id.,* at 8. Respondents also attempt to use Mrs. Anderlik's concession that she would have lacked traditional civil standing to bring suit on behalf of the victimized calf. *Id.,* at 8 fn. 11. Putting aside for the moment the unprecedented notion that a person could possess standing to initiate a case at the trial level but lose standing for purposes of appellate review of

the same case, it appears incumbent on Mrs. Anderlik to respond to what amounts to an attempt to raise, for the first time ever, Mrs. Anderlik's standing to initiate this petition nearly two years ago.[1]

By July 12, 2007, the argument of no standing to initiate the complaint was waived and any opportunity to cure (if such were required, which it was not) was lost due to the statute of limitations on the misdemeanor charges expiring on April 12, 2007. In not having raised this issue before the trial court, RAP 2.5 arguably bars inquiry into this matter. However, should the court regard respondents' counter-statement of issue as a veiled attempt to deny that standing existed at the trial court level, Mrs. Anderlik agrees that RAP 2.5(a)(1) would permit consideration here. Accordingly, Mrs. Anderlik submits the *Declaration of Chris Anderlik,* subjoined as Appendix A, as supplemental authority under RAP 10.8.[2]

B. Abuse of Discretion by District Court

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[1] Mrs. Anderlik's standing was never raised by the Respondents before the District Court. Rather, the first time the issue emerged (albeit obliquely) was in Respondent's *Motion to Dismiss RALJ Appeal*, at page 4, filed in the Superior Court on July 12, 2007, where the Respondents asserted that Mrs. Anderlik was not an "aggrieved party" for purposes of perfecting a RALJ appeal under RALJ 2.1. This argument is not identical to claiming Mrs. Anderlik lacked standing to file the original petition under CrRLJ 2.1(c). *Respondents' Response to Petitioner's RALJ Appeal*, at page 15, notes that Mrs. Anderlik did not have standing to seek appointment of a special prosecutor or to disqualify the Spokane County Prosecuting Attorney's Office.

[2] As a matter of fairness, in not having heard this objection until after the record was closed before the trial court and only appellate jurisdiction remained, Mrs. Anderlik must be provided an opportunity to present additional evidence of standing.

Respondents raise for the first time on appeal the assertion that the trial court abused its discretion in allegedly not considering the prosecution standards contained in RCW 9.94A.411. Asserting that "[n]either Ms. Anderlik nor the district court judge considered the cost of this prosecution[,]" the respondents also omit that the prosecuting attorney who appeared before the district court judge not once raised the issue in briefing or oral argument. Therefore, this issue should be deemed waived under RAP 2.5(a). Besides, the court expressly confirmed that she considered all seven factors outlined in CrRLJ 2.1(c). **RP 1/22/07 33:19—34:3; DCF:MD at 2.**

II. ARGUMENT

A. Standing.

Respondents argue that Ms. Anderlik had no standing to seek appellate review of the district court's denial of her petition because she had no "personal right" to any specific outcome. If this were the test for standing, than no litigant in any civil matter would pass muster since it is within the court's discretion to render specific evidentiary, procedural, and substantive outcomes that may disappoint a plaintiff. Standing is based on the right to have ones grievances heard by an impartial magistrate, never on a right to a specific outcome. Based on the Respondents' concession that Ms. Anderlik had a "right to appear before a judge to request the

filing of charges," it follows that CrRLJ 2.1(c) established and perfected her personal right, or stake, in the result, making her "aggrieved" for purposes of appeal after an adverse outcome. To argue otherwise would lead to the absurd and unheard of result of bifurcating standing at the trial and appellate levels.

Respondents cite to *Victory Distributors* to note that Massachusetts holds that denial of a petition for a citizen complaint creates no judicially cognizable wrong. *Victory Distrib. v. Ayer Div. of Dist. Court Dept.*, 435 Mass. 136, 140 (2001). While this case offers guidance specific to Massachusetts's specific statutes, rules, and case law, it has no binding effect on Washington, particularly where Mrs. Anderlik's criminal complaint was not denied due to lack of probable cause, or failure to meet the seven requirements outlined in CrRLJ 2.1(c)(1-7). Indeed, the district court clearly said that but for CrRLJ 2.1(c)'s unconstitutionality as applied, Mrs. Anderlik was entitled to file her complaint. Furthermore, G.L. c. 218, § 35A does not expressly reference private complaints (see Appendix), while CrRLJ 2.1(c) unambiguously provides a dedicated avenue for citizen-initiated prosecution. Well-settled law notes that where a statute provides a new right, but no remedy, a remedy will be provided.[3]

[3] *McCandlish Elec., Inc. v. Will Constr. Co.*, 107 Wash.App. 85, 97 (2001). Since CrRLJ 2.1(c)'s genesis was both a legislative and constitutional grant of authority to the

Respondents' citation to *In re Hickson,* 573 Pa. 127 (2003) can be distinguished on the ground that it involved appeal of a prosecutor's denial of a citizen criminal complaint after the prosecutor failed to convince a grand jury that probable cause existed. *Id.,* at 131. Nothing similar occurred here, as Mrs. Anderlik, not the prosecutor, prompted a favorable district court probable cause determination. Second, Rule 106 requires consultation with the prosecutor before "appealing" that denial to the court. CrRLJ 2.1(c) does not require consulting with the prosecuting attorney at all, and the petition for the citizen criminal complaint is styled not as an "appeal" from the prosecutor's denial, but an alternative, prosecutorial bypass for initiating a criminal prosecution:

> I, the undersigned complainant, understand that I have the choice of complaining to a prosecuting authority rather than signing this affidavit. I elect to use this method to start criminal proceedings.

CrRLJ 2.1(c) [Affidavit of Complaining Witness]. *Hickson* held that the petitioner did not have standing to initiate the private complaint because he was not a victim or part of the victim's family. However, the court noted that "in rare circumstances, a citizen [may be allowed] to litigate a [civil] matter in which he has no substantial, direct, and immediate

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Supreme Court (RCW 2.04.190 and Wash. Const. Art. IV), it follows that a private right of criminal action became judicially enforceable through statute-delegated rule.

interest." *Id.*, at 139 fn. 6.[4] A private criminal complainant with standing to seek judicial review of a district attorney's disapproval also has standing to challenge the trial court's affirmation of the district attorney's disapproval. *In re Hickson,* 765 A.2d 372, 377 (Pa.Super.2000)(citing *Comm. v. Muroski,* 352 Pa.Super. 15 (1986).[5]

In the case at bar, as with the many animal-related crimes where the animal has no owner or has been abused or neglected by the owner himself,[6] one may readily envision circumstances where private citizens concerned for the welfare of animals will be the only ones motivated to ensure criminal prosecution. The owners of the calf had reason to be fearful of prosecution themselves and would not be so bold as to initiate criminal charges against the deputies. *See* **RP 1/22/07 18:14-18** (prosecutor stating that the owners were probably guilty of a misdemeanor for letting the calf run at large). The calf himself, whether dead or alive,

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[4] Referred to as "global standing," the court explained its rationale for "relaxing the standing requirement" in situations where "these types of matters would likely escape judicial review entirely as the real parties in interest would be disinclined to file a complaint." *Id.* The *Hickson* court refused to extend the global standing doctrine to the criminal realm because it found "no compelling reason to do so in the matter *sub judice*[,]" particularly where it was "hard to imagine a situation in which the directly affected parties would be more motivated to pursue litigation than where the victim has allegedly been murdered." *Id.*

[5] *See also Comm. v. Brown,* 550 Pa. 580 (1998) (prosecuting attorney had standing to challenge granting of private citizen complaint). One may assume that the private citizen had standing to challenge the denial of same given the adverse, concrete dispute between the prosecutor and private citizen.

[6] Washington's anticruelty law permits prosecution of the owner of the animal victimized by cruelty. See Ch. 16.52 RCW.

could not initiate criminal charges as he did not possess legal personhood.[7]

The Cetacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2004), rather than authorizing standing for nonhuman animals *in their own name,* demonstrates that standing for humans *on behalf of* nonhumans is neither imprudent nor outlandish. The *Cetacean* court recognized that humans may serve as plaintiffs on behalf of the class of nonhuman animals:

> Animals have many legal rights, protected under both federal and state laws. ... In other instances, humans whose interests are affected by the existence or welfare of animals are granted standing to bring civil suits to enforce statutory duties that protect these animals. ... It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.

Cetacean, 386 F.3d at 1175-76. Standing as next friends seeking to enforce anticruelty laws on behalf of nonhuman animals is implied from Chapter 16.52 RCW and other criminal and civil laws governing the

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[7] Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights),* 47 UCLA L. Rev. 1333 (June 2000); Steven M. Wise, *Rattling the Cage: Towards Legal Rights for Animals* 43 (2000).

protection of fundamental animal interests and their relationships with humans.[8]

The Second Circuit Court of Appeals's decision in *Inmates of Attica Correctional Facility v. Rockefeller,* 477 F.2d 375, 378 (2nd Cir.1973), cited by Respondents, recognizes that the general rule that a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another has an exception where the private citizen faces immediate and direct danger of injury resulting from nonenforcement:

> Where a successful prosecution, however, would serve to deter the accused from harming the complainant rather than merely supply a penal inducement to perform a duty to provide assistance, the complaining person does show a more direct nexus between his personal interest in protection from harm and the prosecution.

Id. While the *Attica* court did not grant the extraordinary relief sought by the inmates in their effort to compel prosecution of officers following a prison riot, it should be noted that they were not, as here, seeking to prosecute the matter themselves pursuant to a private complaint statute or

[8] Washington's legislature, however, has taken repeated steps to confer standing on even those without an ownership interest in an animal, such that those "with an interest in the welfare of the animal may petition for an order appointing or removing a person designated or appointed to enforce the [animal] trust." RCW 11.118.050. Although no law expressly permits animals to sue in their own name, next friend standing is implied by Washington law, which embraces the federal analysis in *Cort v. Ash* when construing implied causes of action on statutory authority. Applying *Bennett v. Hardy,* 113 Wn.2d 912, 919-21 (1990) to Ch. 16.52 RCW for the substantive law and CrRLJ 2.1(c) for the procedural law, one concludes that a private right of prosecution extends to the

rule. Rather, they were essentially bringing a mandamus action, attempting to compel a duty under 18 U.S.C. §§ 241-242; 42 U.S.C. § 1987. *Id.*, at 377. In cases involving animals who have no spokespersons other than interested parties like Mrs. Anderlik, tortured by law enforcement officers who may continue to deploy Tasers against animals in such reckless fashion, prosecution serves the modern legislative purposes of enacting anticruelty laws – to protect the broad class of nonhuman animals from unnecessary physical pain and suffering even when inflicted by the "property owner."[9]

Respondents next argue that traditional standing analysis should extend to private criminal complaints, citing to *In re Wilson,* 2005 Pa.Super. 211 (2005). *Wilson*'s conclusion is based on citing to *Hickson,* which itself turns provincially on Pennsylvania's colonial history where crimes were deemed offenses against the victim rather than society as a whole. *Id.*, at 206-208. No Washington case is cited by Respondents for the general proposition that traditional standing analysis should apply, much less an attempt to demonstrate that Washington historically viewed crimes as offenses against individuals rather than the state. *Cf. State v.*

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spokesperson of a nonhuman animal who has been tortured as occurred here, to ensure furtherance of these statutes' and rule's legislative intent.

[9] Anticruelty laws historically evolved away from a property-based focus to a morality-based one. *See, e.g.*, Margit Livingston, *Desecrating the Ark: Animal Abuse and the*

Haddock, 141 Wn.2d 103, 118 (2000) (Madsen, J.., concurring (viewing society as the victim of the crime of possession of stolen property, rather than the owner of the property)).

However, the plain language of CrRLJ 2.1(c),[10] Washington's refusal to restrict standing to Article III standards,[11] and Washington's liberal, minority position for taxpayer standing commend permitting Mrs. Anderlik's complaint and right to appeal. The Washington Supreme Court has repeatedly recognized that a taxpayer has standing to challenge illegal governmental acts on behalf of all taxpayers without the need to allege a direct, special, or pecuniary interest in the outcome.[12] "The recognition of

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Law's Role in Prevention, 87 Iowa L. Rev. 1, 21-42(2001)

[10] CrRLJ 2.1(c) provides both standing and a justiciable claim by expressly permitting, broadly and without any prerequisites, "[a]ny person wishing to institute a criminal action alleging a misdemeanor or gross misdemeanor" to appear before a district or municipal court judge and serve as the "complaining witness" for purposes of initiating a criminal prosecution.

[11] Former Supreme Court Justice Talmadge noted that Washington State superior courts are courts of general jurisdiction and are not constrained by subject matter jurisdiction under Article III, Section 2. *Philip A. Talmadge, Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U.L. Rev. 695, 708-11 (1999) (noting that no "case or controversy" requirement appears in the text of the constitutional grant of jurisdiction and Washington courts have never implied any).

[12] *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). Washington's Courts of Appeal concur. *Robinson v. City of Seattle*, 102 Wn.App. 795, 805, 10 P.3d 452 (I, 2000); *Kightlinger v. Pub. Util. Dist. No. 1*, 119 Wn.App. 501, 506-07, 81 P.3d 876 (II, 2003); *Wash. Pub. Trust Advocates ex rel. City of Spokane v. City of Spokane*, 117 Wn.App. 178, 182, 69 P.3d 351 (III, 2003).*See* Varu Chilakamarri, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 Animal L. 251 (2004) (recognizing that Washington is uniquely liberal among other states). However, the taxpayers seeking to bring such action must show that the attorney general refused their demand to institute the action or that this request would have been useless. *O'Brien*, 85 Wn.2d at 269.

taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government." *Boyles,* 103 Wn.2d at 614.

In *Lane v. City of Seattle,* 2008 WL 4594192 (Oct. 16, 2008), the Supreme Court noted that, "To have standing, a party must be in a law's zone of interest and must suffer some harm." *Id.,* ¶ 21. Noting that the plaintiff's "zone of interest" argument was on "shakier ground because he does not directly pay the tax [about which he complained]," the court still determined that the plaintiff might have standing as a "taxpayer interested in making his government follow the law." *Id.* At the time of filing her citizen criminal complaint, Mrs. Anderlik was a taxpayer in the City of Spokane Valley and Spokane County. *Appendix A,* ¶ 5. Few other than Mrs. Anderlik would fall within the "zone of interest" of Washington's cruelty laws.[13]

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[13] Mrs. Anderlik petitioned the prosecuting attorneys for the City of Spokane Valley and Spokane County, as well as the Spokane County Sheriff's Office, to launch a criminal investigation and prosecute the deputies – without success. *Id.,* ¶ 4. Mrs. Anderlik had and has a long-standing interest in animal welfare and rights, having founded such an organization in Michigan in 1989 and revived a similar group in Washington – Animal Advocates of the Inland Northwest – as its president upon her moving to Liberty Lake in 2001. *Id.,* ¶ 3. Mrs. Anderlik filed the criminal complaints based on her own disturbance at learning of the calf death, but also pursuant to the mission of AAIN and on behalf of eyewitness Arabella Akossy, whose declaration adjoined her petition to the district court. *Id.,* ¶ 4.

The citizen criminal complaint is criminal, not civil, in nature, in that criminal procedures (probable cause determination) and substantive laws (crime charged, prosecutorial guidelines of RCW 9.94A.440) follow application of CrRLJ 2.1(c) – which is part of the criminal (not civil) rules. Traditional notions of standing do not apply in criminal cases. *See* Edward Hartnett, *The Standing of the Unites States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in all the Wrong Places,* 97 Mich.L.Rev. 2239, 2248-49 (1999) (to reason and conclude from the current status of the Court's Article III standing doctrine that "the vast majority of federal criminal prosecutions are not 'cases' or 'controversies' and the United States lacks standing to initiate them [would,] ... [o]f course, [amount to] an absurd result.").

> In short, if–as all concede—the United States can prosecute crimes in the federal courts, then a "case" within the meaning of Article III must include litigation that is based on nothing more than the "harm to the common concern for obedience to law," and the "abstract ... injury to the interest in seeing that the law is obeyed."

Id. Of course, whether civil or criminal in nature, the law is in flux as to whether standing is even jurisdictional. *Lane,* at ¶ 20 fn. 1 (Chambers, J., concurring in *Branson v. Port of Seattle,* 152 Wn.2d 862, 879-80 & n. 10

(2004)(noting that a case may be heard even if a party lacks standing, as long as the issue is one of great public interest and well briefed)).[14]

Mrs. Anderlik cited to *State v. Yakey,* 43 Wash. 15 (1906) in her opening brief. This case states clearly that a person making a complaint that a crime has been committed to a magistrate who refuses to act to interfere with the action of the prosecuting attorney refusing same, has sufficient interest to entitle him to institute mandamus proceedings to compel action by the magistrate under Washington's then-extant private prosecution statute, Ballinger's Ann. Codes § 6695. Faced with the Respondents' similar argument here—that Mrs. Anderlik, in serving as a relator on a writ of mandamus, is not a "party beneficially interested" and has no standing to compel prosecution—the Supreme Court, upon evaluating the split of national authority, held:

> the better and more reasonable rule is established by the decisions of the courts of New York, Ohio, Indiana, Illinois, and Iowa, which hold the opposite doctrine, and maintain that when the question is one of public right, and the object of the mandamus to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result; it being sufficient if he shows that he is interested, as a citizen, in having the laws executed and the right enforced.

[14] Having accepted review of this petition, the Supreme Court presumably agrees that the vitality of CrRLJ 2.1(c) presents a question of significant, statewide importance.

Id., at 19. Admittedly, Judge Derr did follow the procedure outlined by CrRLJ 2.1(c), such that a writ of mandamus to compel her to exercise her discretion would not be required. However, the court's order on reconsideration was based not on any factor outlined within CrRLJ 2.1(c):

> If the judge is satisfied that probable cause exists, and factors (1) through (7) justify filing charges, and that the complaining witness is aware of the gravity of initiating a criminal complaint, of the necessity of a court appearance or appearances for himself or herself and witnesses, of the possible liability for false arrest and of the consequences of perjury, the judge may authorize the citizen to sign and file a complaint in the form prescribed in CrRLJ 2.1(a).

CrRLJ 2.1(c). "Separation of powers" qualms are not a basis to deny the complaint. Finding that Mrs. Anderlik did not fail to satisfy any of the above requirements, the court concluded unequivocally that but for the rule's unconstitutionality, the district court would have permitted the complaint to be filed.[15] In this unique procedural context, based on the district court's thought processes, it had a duty to permit Mrs. Anderlik to file her criminal complaint. Accordingly, from the strength of analogy alone, *Yakey* controls and confirms the existence of standing.

B. <u>RALJ-Appealability.</u>

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[15] **DCF:MD at 17, ¶ 1** ("[T]he Court will not disturb its earlier ruling [as to probable cause]."); ***Id.*, ¶ 2** ("[T]he Court previously exercised its discretion to order a criminal complaint be filed."); ***Id.*, at 18, ¶ 5** (the only reason the complaint was not filed was because of "the violation of the Separation of Powers Doctrine.")

Respondents cite to *In re Chubb*, 112 Wn.2d 719 (1989), as authority to bar RALJ appeals unless prescribed by statute or court rule. *Chubb* addresses the right to appeal to the Court of Appeals under the RAP, in accordance with statute and the Constitution, not the right to appeal to the Superior Court from a court of limited jurisdiction under the RALJ. In *Chubb*, the question presented was whether the petitioner could RAP-appeal an interlocutory dependency review hearing order under RCW 13.34.130(3). *Id.*, at 724. Importantly, the proceeding outlined in CrRLJ 2.1(c) is established by Supreme Court rule, the same body that adopted the RALJ – not a statute authorizing a special proceeding, as in *Chubb,* and the determination of Mrs. Anderlik's petition was final, not interlocutory.

Respondents next urge this court to construe the district court's ruling as interlocutory, noting that they still could have filed a criminal case regardless of the outcome of the CrRLJ 2.1(c) hearing, making the court's ruling interlocutory in nature. This position is disingenuous at best, for it was the Respondents who intervened and opposed Mrs. Anderlik's petition from the outset and later persisted in their refusal by seeking reconsideration of the court's January 22, 2007 ruling ordering the parties to this appeal to prepare and file the criminal complaint. The court's decision to reconsider its earlier ruling directly affected the rights of Mrs.

Anderlik to obtain the relief conferred to her by Supreme Court rule, the deputies as to the probable cause determination, as well as the Respondents with respect to their obligation to prosecute the matter presented by Mrs. Anderlik. In other words, complete adversity between the private complainant and the prosecutor existed, raising a ripe dispute for conclusive action by the court. The court's ruling bound the parties with finality, particularly where the respondent represented to the court that there was "no criminal investigation pending or moving forward." **RP 1/22/07 18:2—19:6; 24:5-6; 33:14-15.**

Respondents next cite to *In re Detention of Turay,* 139 Wn.2d 379, 392-94 (1999). As with *Chubb,* this case is also inapposite as it addresses appealability of final orders under the RAP, not the RALJ. While it holds that a postcommitment order is not a "final judgment" subject to appeal as of right under RAP 2.2(a)(1), it reaches this conclusion because the superior court had "continuing jurisdiction over a civilly committed individual until he or she is unconditionally discharged. *Id.,* at 392. In the case at bar, having denied her petition on constitutional grounds only, no continuing jurisdiction could be said to linger over Mrs. Anderlik, or the Respondents, with respect to the private criminal compliant.

In *State v. Taylor*, 150 Wn.2d 599 (2003) the court defined the term "final judgment" in the RAP as:

> A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment[.]

Id., at 602. It then concluded that "an order of dismissal without prejudice in a criminal matter does not bar the State from refiling charges against the defendant within the applicable statute of limitations." *Id.*, at 602. Where the Respondents have taken the proactive position of disclaiming any interest in filing (much less re-filing) criminal charges, it is insincere to argue that, as to Mrs. Anderlik's private complaint, the decision of the district court was not a final judgment settling all of Mrs. Anderlik's rights in the CrRLJ 2.1(c) process and terminating prosecution of the defendants.

Lastly, respondents argue that Mrs. Anderlik's sole means of review was the statutory writ of certiorari, but that even if timely sought, the petition "was doomed to failure," citing *Commanda.* First, Respondents fail to acknowledge the existence of the constitutional writ of certiorari, which does not rely upon time limits fixed for appeal by statute or rule. Instead, it must be lodged within a "reasonable time." *Clark Cy. PUD No. 1 v. Wilkinson,* 139 Wn.2d 840, 847-48 (2000); *State ex rel. Citizens Against Tolls v. Murphy,* 151 Wn.2d 226, 241 (2004).[16]

[16] While the term "certiorari" is used with respect to both writs, the *Wilkinson* court expressly distinguishes how one applies statutory certiorari and constitutional certiorari

Second, Respondents are incorrect in asserting that statutory writs of review may only apply where the jurisdiction of the inferior tribunal has been exceeded, and not due to allegations of errors of law. The holding of *State v. Epler,* 93 Wash.App. 520 (1999), cited by the *Commanda* court, is dictum,[17] completely ignores plain statutory language,[18] and was expressly rejected by Division I and II. *WPEA v. WPRB,* 91 Wash.App. 640 (II, 1998) and *Seattle v. Keene,* 108 Wash.App. 630 (I, 2001).

C. Mootness.

Respondents do not attempt to dispute that any of the exceptions argued by Mrs. Anderlik apply.

D. Special Prosecutor.

While Respondents catalog the legislature's paring back of the role of the private prosecutor in appearing before grand juries and providing that the attorney general could prosecute crimes if appropriate, notably the legislature has not seen fit to repeal RCW 2.04.190, the statute authorizing

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to courts. The reference to *Pierce* in identifying a "writ of certiorari" refers to the statutory, not the constitutional, writ.

[17] The *Commanda* court had no need to address the *Epler* contention since the petitioners "conceded there is an adequate remedy at law after the final judgment" through a RALJ appeal, resulting in their failure to satisfy the statutory requirement that there is no "plain, speedy and adequate remedy in the ordinary course of law." *Id.*, at 656-657

[18] *Commanda* is restricted to the statutory, not constitutional, writ. *See Commanda,* at 654-655.

the Supreme Court to enact CrRLJ 2.1(c) and its predecessor, JCr 2.01, which have been extant for nearly 40 years.

Respondents fail to address the impact of Washington's 1993 constitutional amendment and its interpretation by the Supreme Court in application to district courts, effectively negating the holding of *Ladenburg v. Campbell,* 56 Wash.App. 701 (1990). *Hough v. Stockbridge,* 150 Wn.2d 234 (2003); Const. Art. IV, § 6. Provided this court deems RCW 36.27.030 to apply to district courts based on newly imbued constitutional authority, then settled case law would regard the prosecuting authority as unable to perform his duties due to a conflict of interest, which Respondents note constitutes "other cause." *Respondents' Brief,* at 23 fn. 18.

Respondents focus on *State v. Heaton,* 21 Wash. 59 (1899) as the basis to restrict appointments of special prosecutors to statutory grounds. Yet *Heaton* does not cite any authority for the proposition that only statutes may confer the specific power to appoint special prosecutors except for a Michigan Supreme Court decision, *Sayles v. Genesee Circuit Judge,* 46 N.W. 29 (1890). *Heaton,* at 62. In *Sayles,* the Supreme Court held that the circuit court lacked the statutory power to appoint a special prosecuting attorney. This decision was premised, however, on the

specific language in Michigan's constitution and statute. It did not suggest that authority to appoint special prosecutors only arose by statute.

Heaton expressly echoes this sentiment:

> Doubtless, **in addition to the statutory grounds** authorizing this action of the court in appointing special counsel, **any reason** which would disqualify the prosecuting attorney alike common to the general office of an attorney in his conduct of a cause would justify such action of the court[.]

Heaton, at 62-63 (emphasis added). Unlike *Sayles,* the Washington Constitution was amended to expressly grant district courts full equitable powers. While the *Heaton* court notes that prosecutorial duties are prescribed by statute and that the prosecuting attorney has charge of all criminal proceedings, these citations only prove that the legislature narrowed the scope of tasks to be performed by the elected official, not as a restraint on the power of the courts to appoint a special prosecutor when the elected official and has taken a position in direct conflict with statutory obligations. *Id.,* at 61. *Heaton* also was decided before the sea change in original jurisdiction for certain equitable matters of the district court, of which this is one.[19] As stated above, nor could the legislature abrogate the

[19] Principles of equity do apply to criminal proceedings. *Munro v. Superior Court,* 35 Wn.2d 217, 221-222 (1949)(noting that equity will interfere to prevent prosecution of a criminal matter. Mrs. Anderlik was not seeking injunctive relief to restrain institution or prosecution of criminal proceedings – the issue central to *Munro*. Instead, she was soliciting enforcement of the court's equitable power to permit and enable institution and prosecution of criminal proceedings without conflict.

inherent constitutional powers afforded the courts. In this respect, the statute authorizing appointment of a special prosecutor, RCW 36.27.030, merely makes express the implied power of the superior court.

Heaton also favors Mrs. Anderlik in concluding that the proper method of resolving a court's denial of a prosecutor's motion to dismiss is to force the prosecutor to "discharge ... his duties in the matter" by "proceed[ing] with the prosecution." *Heaton,* at 62. Accordingly, *Heaton* confirms not only that the judicial branch can compel a prosecuting attorney to complete the case once filed and deny the state's own motion to dismiss (ostensibly without violating separation of powers), but that a change of heart will not constitute grounds of disability. Here, the prosecutor did not change his mind about prosecuting the deputies, but maintained resistance (and, thus, his abiding conflict of interest) from the beginning.

CrRLJ 2.1(c) does not mandate that the prosecutor file the complaint. Rather, it states that the court "may authorize **the citizen** to sign and file a complaint in the form prescribed by CrRLJ 2.1(a)." Accordingly, there is no need to engage in a disability analysis where the case is being pursued privately. If, however, the court compels the prosecutor to take control of the case, then, under *Heaton,* a disapproving prosecutor would have to complete the prosecution or bring a motion for

dismissal. Either way, *Heaton* does not compel the district court to determine that CrRLJ 2.1(c) is unconstitutional as applied, whenever the prosecutor voices opposition to charging.

E. Separation of Powers.

While Washington's legislature has passed laws outlining how public attorneys may file charges, Respondents do not cite to any authority expressly prohibiting private citizens from initiating criminal complaints or prohibiting the Supreme Court from allowing such complaints to be filed. CrRLJ 2.1(c) was conceived pursuant to constitutional and legislative grants of authority. RCW 2.04.190; Wash. Const. Art. IV. CrRLJ 2.1(c) is not in irreconcilable conflict with any provision of the Washington Constitution, if only because the legislature delegated the ability to regulate the filing of criminal complaints to the Supreme Court. Furthermore, whether the legislature has the power to restrict criminal actions to those filed by public attorneys disregards the Supreme Court's coextensive authority to provide checks on the other branches. The "crucial function of the separation of powers principle, therefore, is not separation *per se,* but the 'checking' power each branch has over the others." *Comm. v. Mockaitis,* 575 Pa. 5, 24 (2003) (quoted by *In re Wilson, supra,* at 209).

Furthermore, the Respondents fail to cite to any legislative authority that directs that all criminal actions in which a city is a party must be brought by the prosecuting attorney. RCW 36.27.020(4)(referencing the state or county only).[20] RCW 10.37.015, while saying no person may be held to answer in any court for an alleged crime unless upon information filed by the prosecuting attorney, expressly excepts "cases of misdemeanor or gross misdemeanor before a district our municipal judge," as occurred here.

Respondents' restrictive interpretation of the Washington Constitution's Article I, § 25 and Article XI, § 5 as exclusively vesting prosecutorial power in publicly elected attorneys fails to account for the fact that after 1889, the legislature preserved the citizen criminal complaint procedure that had predated statehood by 35 years.[21] These laws were never held unconstitutional as violating separation of powers doctrine. Their mere post-adoption existence offers persuasive evidence that the constitution does not exclusively vest prosecutorial power in public attorneys. What is unclear to Mrs. Anderlik is the legislative and

[20] Mrs. Anderlik's criminal complaint asserted a violation of municipal law as well as state law and identified herself as the relator on behalf of the City of Spokane Valley.
[21] *See* Ballinger Code § 6695 (1897); Pierce Code § 3114 (1905); Remington Revised Code § 1949 (1932).

judicial history pertaining to the predecessor rule to CrRLJ 2.1(c) – i.e., JCrR 2.01, and how it came into existence.[22]

Article I, § 25 states that prosecutions must occur by information or indictment "as shall be prescribed by law." CrRLJ 2.1(c), like other Supreme Court rules, is law having all the force of a statute since it is a rule of criminal procedure implemented from the broad legislative grant of authority pursuant to RCW 2.04.190, an argument disregarded by the Respondents. *State v. Currie,* 200 Wash. 699, 707 (1939).[23] Article XI, § 5 directs the legislature to enact laws to provide for electing prosecuting attorneys as public convenience may require. Nothing in this section, however, states that publicly elected prosecutors retain sole authority to prosecute crimes to the exclusion of private complainants.

In evaluating CrRLJ 2.1(c), the court must consider its intended scope, for if it permits private prosecution of misdemeanors, then no separation of powers objection need be sustained as the prosecuting authority is not being compelled to take any action. If limited to private initiation, then, as repeatedly stated by the district court judge, once filed

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[22] A request for the judicial history from the Supreme Court yielded no documents. Such documentation confirming the rule's genesis would assist all parties and this court in evaluating its soundness.

[23] *Currie* notes that the legislature delegated to the Supreme Court the responsibility of making rules relating to pleading, procedure and practice in the courts of the state, and that those rules, such as Rules of the Supreme Court 12 and 17 dealing with timely perfection of appeal, have "all the force of a statute."

the case is owned by the prosecuting authority who may handle the matter as she would any other – including, arguably, voluntary dismissal. **RP 1/22/07 34:8-20.** Accordingly, whether the prosecutor in this case could have dismissed Mrs. Anderlik's complaint is immaterial to whether the district court had the right to bar filing of the complaint in the first place.

As to Respondent's concern that a trial judge who is part of the accusatory process in allowing a CrRLJ 2.1(c) complaint to be filed may invade due process rights of the accused, the simple remedy is to require that judge's recusal from the subsequent prosecution.

F. Abuse of Discretion by District Court.

As stated above, this issue of expense was never raised at the trial level and should be deemed waived. If nonetheless considered, the record is replete with written and verbal references confirming that the district court judge expressly considered the prosecution standards of RCW 9.94A.040 (as required by CrRLJ 2.1(c)(7)).[24]

III. CONCLUSION

For the reasons stated above, Mrs. Anderlik's assignments of error should be sustained.

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[24] On the issue of expense, it should be noted that all out-of-state experts all donated their time to assist in reviewing this matter due to the heinousness of the facts involved. Additionally, the prosecuting attorney could have sought local experts (for instance, from the local veterinarians or faculty at the Washington State University College of

Dated this October 21, 2008

ANIMAL LAW OFFICES

Adam P. Karp, WSB No. 28622

Veterinary Medicine).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2008, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

[x] **Email (stipulated)**

Pamela Loginsky
Washington Ass'n of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501-1399
(360) 753-2175
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/s/ Adam P. Karp
Adam P. Karp, WSB No. 28622

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SPOKANE VALLEY ex rel. CHRIS ANDERLIK, Petitioner-Appellant, vs. BALLARD BATES and DUANE SIMMONS; Respondents.	Case No.: 81295-1 **DECLARATION OF CHRIS ANDERLIK**

DECLARATION

I, CHRIS ANDERLIK, being over the age of eighteen and fully competent to make this statement, and having personal knowledge of the matters contained herein, hereby affirm:

1. I am currently 82 years old and reside with my husband in Liberty Lake, Washington.

2. I was graduated from the University of Illinois in 1948, where I majored in chemistry. I later taught chemistry in Virginia and Michigan high schools.

3. My involvement in animal welfare and animal rights is extensive and of long duration. In Traverse City, Michigan, in 1989, I co-founded the 501(c)(3)-status animal rights organization *For Animals*, which remains active. In September 2000 in Lansing, Michigan, I was awarded an Animal Humanitarian Lifetime Award by the Michigan Federation of Humane Societies and Animal Advocates. In 2001, my husband Robert E. Anderlik and I moved to Liberty Lake, Washington to be near our children and rejuvenate the defunct nonprofit corporation *Animal Advocates of the Inland Northwest* ("AAIN"). With my assistance, AAIN now has a dues-paying membership of approximately 80. We hold monthly meetings at the Spokane Valley Library with

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vegan potlucks in the summer months. We host a webpage for the organization, and I have an active email list of approximately 90. Our family, as well as this organization, contributes generously to the local animal shelters. Currently, I am the Executive Secretary for AAIN. My husband has taken over the presidency due to my health.

4. Arabella Akossy was a member of AAIN prior to the Tasering of the male calf on April 12, 2006. Prior to this date, I had worked with her and visited the site of the threatened wetlands in her area. She was concerned with the wildlife there, and I can vouch for her sincerity. Ms. Akossy was an eyewitness to the Tasering of the calf in this matter. I also learned of the Tasering through local media. At the time I filed the citizen criminal complaint, Ms. Akossy had relocated to California. On her behalf, and pursuant to the mission of AAIN, I filed the citizen criminal complaint against Deputies Bates and Simmons for what I believed to be misdemeanor animal cruelty. Through my attorney, Adam P. Karp, I petitioned the prosecuting attorneys for the City of Spokane Valley and Spokane County, as well as Internal Affairs with the Spokane County Sheriff's Office, asking them to take action against the officers involved in the death of this animal.

5. As residents of Liberty Lake since 2001, we did and continue to do much of our shopping in and around the city limits of Spokane Valley and in Spokane County, particularly the Spokane Valley Mall where the calf who is the subject of this citizen criminal complaint died. For years, I have regularly written letters to the editor of the *Spokesman-Review* concerning animal-related issues of local concern and stay involved in keeping our membership and the public informed about issues of animal welfare and rights that affect our region.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this October 19, 2008, in the city of Liberty Lake, Washington.

Barbara C. "Chris" Anderlik

Barbara C. "Chris" Anderlik

October 19, 2008

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APPENDIX B

M.G.L.A. 218 § 35A

Process; issuance on complaints for misdemeanors; consideration of criminal records and domestic violence records; right to hearing

If a complaint is received by a district court, or by a justice, associate justice or special justice thereof, or by a clerk, assistant clerk, temporary clerk or temporary assistant clerk thereof under section 32, 33 or 35, as the case may be, the person against whom such complaint is made, if not under arrest for the offense for which the complaint is made, shall, in the case of a complaint for a misdemeanor or a complaint for a felony received from a law enforcement officer who so requests, and may, in the discretion of any said officers in the case of a complaint for a felony which is not received from a law enforcement officer, be given an opportunity to be heard personally or by counsel in opposition to the issuance of any process based on such complaint unless there is an imminent threat of bodily injury, of the commission of a crime, or of flight from the commonwealth by the person against whom such complaint is made. The court or said officers referred to above shall consider the named defendant's criminal record and the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation in determining whether an imminent threat of bodily injury exists. Unless a citation as defined in section 1 of chapter 90C has been issued, notice shall also be given of the manner in which he may be heard in opposition as provided herein.

The court, or said officer thereof, may upon consideration of the evidence, obtained by hearing or otherwise, cause process to be issued unless there is no probable cause to believe that the person who is the object of the complaint has committed the offense charged.

The term district court as used in this section shall include the Boston municipal court department and the juvenile court department.

CREDIT(S)

Added by St.1943, c. 349, § 1. Amended by St.1945, c. 293; St.1978, c. 478, § 193; St.1992, c. 188, § 6; St.2004, c. 149, § 200, eff. July 1, 2004.

M.G.L.A. 218 § 32

Complaints and warrants

District courts may receive complaints and issue warrants and other processes for the apprehension of persons charged with crime and found within their county, or who after committing crime therein escape therefrom, returnable before a court of the county having jurisdiction of the trial or examination of the person charged with the crime.

CREDIT(S)

Amended by St.1958, c. 48, § 1.

M.G.L.A. 218 § 33

Warrants and process; power of clerks to issue

A clerk, assistant clerk, temporary clerk or temporary assistant clerk, may receive complaints, administer to complainants the oath required thereto, and issue warrants, search warrants and summonses, returnable as required when such process are issued by said courts. No other person, except a judge, shall be authorized to issue warrants, search warrants or summonses.

CREDIT(S)

Amended by St.1978, c. 478, § 191.

M.G.L.A. 218 § 35

Complaints, warrants and process; power to issue; disqualification to hear case; destruction of applications for complaints

A justice or special justice of a district court, or a justice of the peace who is also a clerk or assistant clerk of such a court, may at any time receive complaints and issue warrants and summonses, under his own hand and seal, and such justice or special justice may likewise issue search warrants,

returnable before a court or trial justice having jurisdiction of the trial or examination of the person charged with the crime. If, after a hearing on the issuance of a complaint or a request for a search warrant, by a justice or special justice of a district court he issues such complaint or warrant, he shall be disqualified from presiding over a trial on the merits of any matter brought to trial because of such complaint or warrant if the defendant objects to his sitting before any evidence is taken.

If such an application for the issuance of a complaint is denied, the clerk of the district court wherein such application was made shall destroy such application one year after the date such application was filed, unless a justice of such court or the chief justice of the district courts shall for good cause order that such application be retained on file for a further period of time. The clerk shall enter on the face of any application so denied a conspicuous notation to that effect, and such applications shall be maintained separately from other records of such court. The provisions of this paragraph relating to the destruction of such applications shall not apply to applications filed pursuant to section twenty C of chapter ninety.

CREDIT(S)

Amended by St.1964, c. 201; St.1975, c. 552; St.1978, c. 478, § 192; St.1992, c. 379, § 143.

OFFICE RECEPTIONIST, CLERK

To: adam@animal-lawyer.com
Cc: pamloginsky@waprosecutors.org
Subject: RE: City of Spokane Valley ex rel. Anderlik v. Bates (No. 81295-1) - Petitioner's Reply Brief

Rec. 10-21-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Adam P. Karp [mailto:adam@animal-lawyer.com]
Sent: Tuesday, October 21, 2008 3:59 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: pamloginsky@waprosecutors.org
Subject: City of Spokane Valley ex rel. Anderlik v. Bates (No. 81295-1) - Petitioner's Reply Brief

Dear Clerk and Ms. Loginsky,

Please confirm receipt of the attached *Reply Brief* filed on behalf of the petitioner-plaintiff Chris Anderlik in the above matter, *City of Spokane Valley ex rel. Anderlik v. Bates*, No. 81295-1.

Thank you,
Adam Karp

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